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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 929.

JAY LEE GIBSON,

Petitioner,

v.

L. D. JOHNSON and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TWELFTH SUPREME JUDICIAL DISTRICT OF TEXAS.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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QUESTION PRESENTED.

A locomotive engineer was seriously injured during the course of his employment. Subsequently, he brought suit under the Federal Employers Liability Act against his employer railroad. In that suit, the engineer alleged that his injuries were serious, permanent and disabling and caused him to be permanently disabled to work and permanently impaired from earning a livelihood. About four months after recovering judgment, the engineer requested his return to work. When the carrier refused, he asked his union to process a grievance in his behalf. After the engineer's grievance was finally declined by the railroad, the union submitted his claim to the National Railroad Adjustment Board for compulsory and final arbitration under

Section 3, First (p) of the Railway Labor Act, prior to the 1966 amendment. (45 U. S. C. 153, First (p); 44 Stat. 578, as amended 48 Stat. 1189.) The Board, with a neutral referee, both in its original opinion and its opinion on interpretation requested by the union, refused to order reinstatement on the ground that his claim against the employer railroad for return to work as an engineer was estopped by the judgment rendered in the Federal Employers Liability Act case against the same railroad. The Adjustment Board said that, having gained judgment against the carrier for permanent inability to perform work as locomotive engineer, he could not later assert that he was capable of resuming work as a locomotive engineer for the railroad. The engineer then brought suit against his union for mishandling his grievance or claim to return to work.

The question presented is whether, in a suit brought in a state court against the union representative for alleged misfeasance or nonfeasance in handling the claim through the grievance and arbitration procedures, the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas erred in granting summary judgment for the union on the basis that the employee's claim before the Board could not have been sustained, despite any conduct of the union representative, due to the doctrine of collateral estoppel applied by the Board in its final and binding decision on the claim for reinstatement.

STATEMENT.

On December 5, 1950, petitioner, a locomotive engineer, suffered on the job injuries. (Tr. 30.) Petitioner then brought suit against his employer railroad under the Federal Employers Liability Act. (Tr. 29-34, 35-40.) In the original petition, filed December 5, 1952, in that suit, petitioner alleged that as a result of the accident he had suffered and sustained "serious, permanent and disabling injuries." (Tr. 31.) Petitioner alleged in effect that he suffered and sustained a great and tremendous shock to his entire nervous system and an injury to his back of such a degree "to permanently impair plaintiff's ability to work and earn money," which injuries "are of such a nature as to cause him to suffer pain for the balance of his life." (Tr. 32-33.)

In the amended petition, filed January 29, 1955, in the FELA suit, petitioner alleged, in effect; that he had earned and was capable of earning $550.00 per month or $6,600.00 per year, and that he sustained a tremendous shock to his entire nervous system (Tr. 38) and a severe injury to his head and back such as to permanently impair plaintiff's ability to work and earn money. He further alleged:

> "*The injuries suffered and sustained by plaintiff are of such a nature as to cause him to suffer severe physical pain and mental anguish for the balance of his life.* Further, as a result of the injuries suffered and sustained by the plaintiff, and by virtue of the physical pain and mental suffering which he has suffered in the past and which he will in reasonable probability suffer in the future and *because of plaintiff's disability to work, which is permanent,* and because of the loss of earnings in the past and the earnings which in reasonable probability will be lost in the future as a result of his injuries * * * plaintiff has been damaged in the sum of Eighty Thousand Dollars ($80,-

000.00) for which amount he here now sues." (Tr. 38-39.)

Petitioner's testimony in 1955, adduced in the FELA case, was to the effect that he had not worked since January 13, 1951; that he was not able to work and that his condition had become worse since the accident; and that he knew that he couldn't go back to work for the railroad because of this condition. (Tr. 77.)

Petitioner further supported his allegation of permanent disability by introducing the testimony of Dr. N. Stuart White, of Tulsa, Oklahoma, which was substantially that: Plaintiff sustained an injury to the dorsal and cervical spine, *aggravating a pre-existing arthritic condition;* that he sustained a disc injury in both the cervical and lumbar region of the spine. In addition plaintiff sustained a skull injury, causing damage to the pituitary gland causing a rapid increase in weight resulting in slow reaction to questions and as a whole; and that as a result of these injuries plaintiff was "* * * *totally and permanently disabled from performing any type of manual labor.*" (Tr. 78-79.)

The former suit went to trial before a jury on July 11, 1955. (Tr. 41.) In submitting the damage issue in the case, the court charged the jury that they could consider, *inter alia,* the reasonable present cash value of lost earnings that plaintiff would in reasonable probability sustain beyond the date of trial as the result of the accident in question. (Tr. 46-47.) The court further instructed the jury that in arriving at the amount of damages to be awarded petitioner in that suit, the jury could not consider or allow any recovery for past or future physical pain and mental suffering or past or future loss of earnings, if any, caused by arthritis or other condition, if any, which existed prior to the occasion made the basis of the suit, ex-

cepting so far as such physical pain and mental suffering or loss of earnings, if any, resulted from an aggravation of such a prior condition of arthritis or other conditions. (Tr. 47-48.)

The jury found damages of $32,500.00. (Tr. 46.) That suit went to the Texas Court of Civil Appeals which affirmed the trial court in *Thompson v. Gibson,* 290 S. W. 2d 305 (1956). This decision was reversed by the Texas Supreme Court, *Thompson v. Gibson,* 298 S. W. 2d 97 (1957). This Court subsequently reversed the Texas Supreme Court in *Thompson v. Gibson,* 355 U. S. 18 (1957). The suit was the subject of further opinion by the Texas Supreme Court in *Thompson v. Gibson,* 310 S. W. 2d 564 (1958), and mandate was issued on March 14, 1958. (Tr. 52.)

About four months later, July 5, 1958, petitioner requested permission from the employer railroad to return to work. (Gibson Dep. pp. 57-63; Johnson Dep. p. 10.) This request was denied by the railroad. Petitioner then sought and obtained the assistance of Respondent Johnson in the further handling of his claim or grievance with the railroad. Respondent Johnson commenced processing Gibson's claim through the various levels of railroad officials, all without success. On June 11, 1959, the last railroad official to whom the dispute could be appealed refused petitioner's claim for return to service on the ground that plaintiff was disqualified from further service because he pleaded and proved that he was permanently disabled as a result of injuries in the former FELA case. (Johnson Dep. pp. 24-25.)

On October 12, 1959, respondents submitted petitioner's claim to the National Railroad Adjustment Board under Section 3, First (p) of the Railway Labor Act. (Johnson Dep. pp. 25-26.) Coupled with petitioner's claim for

re-employment was a claim for lost earnings resulting from the railroad's refusal to permit his return to work. The lost pay portion of petitioner's claim was referred by the Adjustment Board to the Joint Dispute Committee under the National Rules Agreement of August 11, 1948 which pertains to time limitations on claims for pay for time lost. The Dispute Committee held that the claim for lost pay was foreclosed because the appeal on that subject had not been perfected to the Adjustment Board within the six month limitation period as prescribed by Section 17(c) of the August 11, 1948 agreement. The Dispute Committee also held that plaintiff's claim to return to service was to be determined by the Adjustment Board. (Tr. 56-57.)

On October 31, 1963, the NRAB, with the neutral referee required to break the deadlock of the employee and carrier members, considered petitioner's claim for return to service on the merits and held adversely to petitioner. (Tr. 58-60.)

On December 16, 1963, Respondent Brotherhood requested an interpretation of the award. The interpretive opinion of the NRAB, dated March 18, 1964, consists of the opinion written by the referee (Tr. 61-62), the dissent by the labor members (Tr. 62-65) and the supporting opinion of the carrier members. (Tr. 65-67.) The referee's opinion shows that the original award in the instant case was rendered "on the same reasoning and logic" as that adopted in Board Award 17452, which was cited and partly quoted in the original award. The cited award (Tr. 68-70) was a claim similar to petitioner's wherein that claimant had recovered in a FELA suit the sum of Twenty Thousand Dollars ($20,000.00) for total and permanent disability and later requested return to service. In the cited claim, the Board held that the claimant had been paid in advance what the court found to

be due him for being permanently deprived of his work. In requesting the interpretation in the instant case, respondents argued, as indicated in the referee's opinion, that the limited use of language by the Board from the authority cited did not mean that petitioner was to be kept out of service. The referee responded, however, that the original award did not intend "to put the claimant back on the engine or return him to engine service as it was felt his testimony and that of expert medical witnesses proved that such would be unwise, and the award so held." (Tr. 62.)

The dissenting opinion of the labor members of the Board stated that the complete transcript of the FELA case was before the referee, that respondents called the Board's attention to the fact that in petitioner's FELA trial the railroad had controverted his claim regarding nature and extent of injury, and that respondents pointed up the medical testimony of four doctors indicating petitioner was not then disabled. (Tr. 63.) In a supporting opinion, the carrier members of the Board cited a number of court decisions as authority for the application of estoppel in denying reinstatement. Both the original award and the subsequent interpreting opinion of the NRAB demonstrate that the doctrine of estoppel was applied, based on petitioner's prior claim of disability and payment therefor in his FELA case, and that this was the sole basis of the award.

Having failed to require the railroad to return him to duty by means of the grievance and arbitration procedures, petitioner brought an action in the Third Judicial District Court of Anderson County, Texas, on April 23, 1965, charging respondents with mishandling "his claim for reinstatement in such a manner that the same would be lost otherwise and upon its merits," and that he was en-

titled to damages on that account, actual and punitive, of $250,000.00. (Tr. 2-10.)

By amended answer, respondents asserted a general denial and specifically denied that any conduct of respondents caused the decision of the Adjustment Board which denied petitioner's claim to be restored to his former employment. (Tr. 15-16.) Respondents also affirmatively alleged the presentation of plaintiff's claim to railroad officials and to the Adjustment Board, incorporated the proceedings thereon before the Board as exhibits to defendants' amended answer, asserted that such proceedings show that petitioner's claim to return to the job was considered by the Board on its merits and that the Board's decision was based upon petitioner's prior claim of disability and his payment therefor, in essence estoppel, and that petitioner was likewise estopped in his suit against respondents. (Tr. 21-25.)

Respondents filed a motion for summary judgment (Tr. 71-73), which was granted in the trial court on March 31, 1966. (Tr. 81-82.) Petitioner filed nothing in response to the motion for summary judgment. (Petition, p. 18.)

On appeal to the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas, the judgment of the trial court was affirmed. The Court of Civil Appeals held unanimously the evidence conclusively showed that, irrespective of any misfeasance or nonfeasance on the part of the respondents, petitioner was estopped as a matter of law to claim his right to re-employment in that petitioner's claim against the railroad for re-employment was barred by estoppel and thereby his claim for damages against respondents for misfeasance and nonfeasance in the prosecution of his claim would likewise be barred for the same reason. The test applied by the court was that

the respondents would be required to conclusively show "(1) that appellant [petitioner] would not have been successful even though the claim had been properly prosecuted or (2) that neither the alleged acts of misfeasance or nonfeasance proximately caused the adverse ruling or loss of his claim." (Petition, p. 21.) Based on the enunciated test, the court's holding was as follows:

> "In view of the law pronounced by the foregoing authorities, we have concluded that the evidence offered by the appellees in support of their motion for summary judgment is sufficient to establish the defense of estoppel and thereby defeat appellant's claim for damages. As we view it, the evidence conclusively shows that irrespective of any misfeasance or nonfeasance on the part of the appellees, appellant was estopped as a matter of law to claim his right to re-employment. The defense of estoppel having thus been shown to exist as a matter of law, the question of whether appellees were guilty of misfeasance or nonfeasance becomes immaterial. Since appellant's claim against the railroad for re-employment was barred by estoppel, his claim for damages against appellees for misfeasance and nonfeasance in the prosecution of his claim would likewise be barred for the same reason. That is to say, appellant having alleged and proved in a former judicial proceeding in this state that he was totally and permanently disabled, he will not now be heard to say in this suit that he was not totally and permanently disabled for the purpose of establishing a cause of action against appellees for misfeasance or nonfeasance in presenting his claim before the NRAB. As we view it, the evidence was sufficient to establish facts which, if proven at the trial, would establish the defense of estoppel and thus entitle appellees to an instructed verdict." (Petition, pp. 23-24.)

In the course of its opinion, the Court of Civil Appeals referred to petitioner's contention, while recognizing

the rule of estoppel, that there was raised by the pleadings a sufficient fact issue upon the question of whether respondents properly presented the matter to the Board. The court said:

> "[Petitioner] seems to take the position that appellees should have in some manner convinced the board that estoppel was not applicable because his previous suit against the railroad was not in fact or in law a suit for total and permanent disability nor was the judgment large enough to show that he is being compensated for total and permanent disability. All proceedings in that suit were before the board, and based upon those proceedings, the board concluded that the facts sustained the railroad's defense of estoppel. The very same evidence is now presented to us for the purpose of showing that appellant's claim before the NRAB could not have been successfully prosecuted despite the conduct of appellees because of the legal barrier of estoppel. It is also presented to us for the purpose of proving the defense of estoppel in appellant's claim for damages." (Petition, p. 23.)

REASONS FOR DENYING THE WRIT.

This case involves no important or novel question of law but only the question whether the Court of Civil Appeals correctly assessed the record made on a motion for summary judgment in a state court action for damages resulting from alleged misfeasance or nonfeasance of a union representative in handling a claim of an individual's right to return to work with a railroad. The Court of Civil Appeals held that since successful prosecution of the claim was impossible, the union's conduct in presenting the employee's fruitless claim before the National Railroad Adjustment Board could not, as a matter of law, have been a causal factor in the adverse ruling of the Board, and therefore respondents' conduct was not a cause in fact of any damages suffered by him.

Whether the Court of Civil Appeals was right in that decision—and it clearly was—is not a question that deserves review by this Court.

Contrary to petitioner's assertions, the decision below is not in conflict with any decision of this Court and presents no question under the Railway Labor Act, § 301 of the Labor-Management Relations Act, or the Federal Employers Liability Act which merits this Court's review. In fact § 301 of the LMRA is totally inapplicable in this proceeding and was never raised by petitioner at any point in the state court proceedings. The provisions of the Federal Employers Liability Act are neither involved directly nor indirectly in this proceeding. The only context in which FELA arises is the fact that petitioner brought a previous action against his employer railroad for personal injuries suffered while in the course of his employment, which action was brought under the Federal Employers Liability Act. And the Adjustment Board with a neutral referee found that, having gained judgment against the carrier for permanent incapability to perform work as a locomotive engineer, petitioner could not later assert in the grievance and arbitration proceedings that he was capable of resuming work as a locomotive engineer for the same railroad.

Petitioner now apparently asserts his right to review "arises out of alleged misfeasance in the handling of a grievance under the provisions of Sec. 153, Title 45, U. S. Code * * *." (Petition, p. 2.) As stated, petitioner is not asserting any violation of Section 3 or any other section of the Railway Labor Act. The quotation merely refers to the fact that the grievance was handled by the union under the provisions of Section 3 of the Railway Labor Act. As the petitioner's original petition (Tr. 2-10) indicates and as the Court of Civil Appeals states (Petition, p. 20), this proceeding involves a cause of action in tort for damages

resulting from misfeasance or nonfeasance of petitioner's union representatives in handling his claim of a right to return to work for the railroad.

The decision below is in accord with those decisions enunciating the statutory duty of fair representation. *Steele v. Louisville & N. RR.*, 323 U. S. 192 (1944). Under that doctrine, respondents were obligated to progress petitioner's claim in good faith and honesty and without hostility, discrimination or arbitrary conduct. *Humphrey v. Moore,* 375 U. S. 335 (1963). The facts clearly show that respondents did do so throughout the grievance procedures, did do so in submitting and handling the claim before the Adjustment Board, and did do so in requesting further interpretation by that Board.

However, rather than rendering a decision on the claim under the provisons of the applicable collective bargaining agreement, the Board, through a neutral referee, held petitioner was estopped from asserting his ability to return to work based upon the judgment in his previous personal injury suit, which the Board found was based on petitioner's permanent inability to work. As the record establishes and the Court of Civil Appeals found thereon, all the proceedings in the prior personal injury suit were before the Board and the issue of estoppel was thoroughly litigated by it. In fact, the matter was the subject of a vehement dissent by the employee members.

There was nothing further that respondents could have done to have altered the Board's decision. Petitioner cannot, and does not, point to any bad faith or arbitrary conduct of respondents which caused the Board to take this position, or to any good faith actions respondents could have taken, but did not, which would have made the Board reach a different result. At most, petitioner asserts that in some cases the Board has not applied the doctrine. But it is equally true that, in others, the Board,

with a different neutral, has applied estoppel on similar facts. (Tr. 68-70.)

Petitioner now seeks in this action to relitigate the holding of the Board on the same grounds raised and argued by respondents in that very proceeding, which arguments were rejected by the arbitrator, even though the findings of the Board contained in its award are final and binding. *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U. S. 257 (1965). There is, therefore, a critical difference between this case and *Humphrey v. Moore*, 375 U. S. 335 (1963). In the latter, the grievance was adjusted prior to arbitration. As one commentator has stated: "Had the matter gone to arbitration with the same result, any such review by the courts of the arbitrator's decision on the merits and his authority to act could not have been tolerated." Van Zile, *The Componential Structure of Labor-Management Contractual Relationships; Republic Steel Corp. v. Maddox* and *Humphrey v. Moore*, 43 U. DET. L. J. 334-5 (1966).

The Texas Court of Civil Appeals found that the Board, with everything before it, had applied the doctrine of estoppel. Therefore, the Court correctly held that, regardless of any action or inaction of respondents, the claim could not have been successfully prosecuted under the arbitrator's application of estoppel to the petitioner's claim. On this basis, the court would not allow petitioner to collaterally attack that decision in this case.

If petitioner were permitted to have a trial de novo, so to speak, with respect to the Board's findings, a union would be subject to suit for refusing to handle a grievance, no matter what the merits, and also subject to suit for malpractice relative to arbitration because the arbitrator, in disagreement with petitioner's views, found against the claim. Petitioner, though admitting his contentions were

presented to the Board (Gibson Dep. p. 121), is apparently seeking to make the union an insurer of the success of arbitration. Thus, it becomes apparent that there must be some finality in these matters. This Court has indicated that the employee does not have an absolute right to have his grievance taken to arbitration and that a union may at some point end the handling of frivolous grievances. See *Vaca v. Sipes,* 386 U. S. 171 (1967). Recognizing this, it assuredly follows that a union cannot be held liable relative to a claim found fruitless by the arbitrator.

The petitioner's claim that the Texas Court of Civil Appeals' decision conflicts with *Vaca v. Sipes, supra,* is unavailing. That case, unlike this one, involved a refusal by the union to submit the grievance to arbitration. In the employee's suit for breach of the duty of fair representation, the state courts awarded him damages on a finding that the grievance was meritorious. There was no evidence that the union breached its statutory duty by failing to press the grievance as a result of arbitrary or bad faith conduct. Because the holding of *Vaca v. Sipes, supra,* is that the refusal of the union to progress a meritorious grievance did not, as a matter of law, constitute the breach of the statutory duty, that case does not assist petitioner.

If the decision is pertinent here, it simply establishes that the Court of Civil Appeals made a correct determination. To establish compensable liability upon the union, there must be findings that (1) the claim is meritorious; (2) the union must have breached its duty through arbitrary, hostile and bad faith conduct; and (3), to establish damages, the union's conduct was the cause of the employee's loss. The Court of Civil Appeals stated that the respondents were "required to conclusively show (1) that appellant [petitioner] would not have been successful even though the claim had been properly prosecuted or

(2) that neither the alleged acts of misfeasance or nonfeasance proximately caused the adverse ruling or loss of his claim." (Petition, p. 21.) Petitioner cannot, and in fact does not, complain of the test applied by the court based on petitioner's alleged acts of negligence, because said test would appear to be less stringent as to his cause than the standards pronounced by this Court. To the extent possibly relevant herein, the Court of Civil Appeals did follow those requirements. In the instant case, the court found that, despite any alleged conduct of respondents, petitioner's claim could not have been successfully prosecuted before the Board in view of its application of the doctrine of estoppel.

Petitioner further claims that the references by the court below to *Jones v. Central of Georgia Ry. Co.*, 331 Fed. 649 (5th Cir. 1964) and *Hodges v. Atlantic Coast Line R. Co.*, 363 F. 2d 534 (5th Cir. 1966), establish a reluctance by that court to allow petitioner "a right to sue his union" although "the *Vaca* case recognizes that right." (Petition, p. 9.) This assertion is based on an erroneous view of what the Court of Civil Appeals decided in this case. In combination with the court's reference to the recognition of the principle of collateral estoppel in that state's law, it would appear that the court is saying that the doctrine was appropriately applied by the Board and that respondent is estopped from asserting "a claim for damages based upon an alleged substantive right which did not exist." (Petition, p. 25.) Further, the court is showing through these decisions that, if the claim had been sustained by the Board on October 31, 1963, it could not have been enforced in a Section 3, First (p) suit due to the defense of estoppel, which had been applied under similar facts by the United States Court of Appeals for the same circuit in which the instant action was brought. *Jones v.*

Central of Georgia Ry. Co., supra. That ruling was in accord with a long line of decisions by the lower federal courts as shown in the supporting opinion of the carrier members of the Board. (Tr. 66.) Subsequently, this Court in *Gunther v. San Diego & Arizona Eastern Ry., supra,* held that the findings in the Board's awards are final and binding on the railroad as well as the employee receiving an adverse decision. Thus, in *Hodges v. Atlantic Coast Line R. Co., supra,* the Court of Appeals for the Fifth Circuit held in a case somewhat like *Jones, supra,* that the Board's award was final and binding. That court, nevertheless, went on to admonish the Board in regard to the principle of estoppel by stating:

> "It does seem to us that at some point in the [Board] procedure the matter of estoppel should have been considered and a decision rendered with respect to it." *Id.* at 539.

In the instant case, the Board did consider the matter of estoppel, held it was a valid defense to the claim, and issued its award on that basis.

Thus, whether the Board applied the doctrine or whether the doctrine would be applied by the courts in a breach of duty suit is unimportant, for a union that takes a claim to the Board should not be subjected to possible liability because the Board saw fit to apply the principle in denying the claim. As the Court of Civil Appeals appropriately held, the application of the estoppel doctrine by the Board shows that the claim could not have been successfully sustained and further that the defense of estoppel would have negated petitioner's cause for damages in this suit. This determination raises no issue which warrants review by this Court. It involves a unique factual situation, fully canvassed by the court below and not

likely to ever again arise.[1] Whether or not decided correctly—and respondents believe it was—the question is not one meriting this Court's attention.

CONCLUSION.

For the foregoing reasons the Petition should be denied.

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[1] In this respect, it may be noted that the 1966 amendments to Section 3 of the Railway Labor Act incorporate a new subsection (q) by which an employee, aggrieved by the failure of the Board to make an award or by any of the terms of an award "may file in any United States District Court in which a petition under paragraph (p) could be filed, a petition for review of the division's order." (45 U. S. C. § 153, First; 44 Stat. 578; 48 Stat. 1189; 80 Stat. 208, 209.)